

EXHIBIT 5

In The Matter Of:

MICROSOFT CORPORATION

v.

MOTOROLA INC., et al.

GREGORY LEONARD, Ph.D. - Vol. 1

June 24, 2013

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MERRILL CORPORATION

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1 (Exhibit 6 was marked for identification.) 09:19

2 THE WITNESS: I got it. 09:19

3 BY MR. PRITIKIN: Q. Is Exhibit 6 a copy of an 09:19

4 expert report you prepared and that is dated October 21, 09:20

5 2011, in the Apple-Motorola litigation? 09:20

6 A. It seems to be, yes. 09:20

7 Q. Would you turn, please, to page 7. 09:20

8 A. Okay. 09:20

9 Q. Would you read paragraph 9 to yourself. 09:20

10 A. Okay. 09:20

11 Q. Do you still agree with this statement in 09:20

12 paragraph 9? 09:20

13 A. Yes. 09:20

14 Q. Would you turn to paragraph 10. In paragraph 09:20

15 10 you wrote, "For a royalty to be FRAND" -- and you 09:20

16 understand FRAND to mean the same as RAND? Those are 09:20

17 interchangeable terms? 09:20

18 A. From an economist's point of view. And again, 09:20

19 I'm not sure, there may be a legal difference, I guess. 09:21

20 But from my point of view, they're basically the same. 09:21

21 Q. All right. In paragraph 10 you wrote, "For a 09:21

22 royalty to be FRAND, it should be commensurate with the 09:21

23 economic value of the patented technology to the 09:21

24 licensee relative to the next best alternative 09:21

25 technology prior to the standard being set, and thus 09:21

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1 to interconnect with certain other devices somebody 09:27
2 might have in their home. Those devices would have 09:27
3 802.11. 09:27

4 So, again, it's probably more likely if there 09:27
5 was lock-in at that point for 802.11. 09:27

6 BY MR. PRITIKIN: Q. Have you read the 09:27
7 testimony of Mr. Danski (phonetic) in the first trial? 09:27

8 A. Probably, I think so. 09:27

9 Q. Are you aware that he testified that H.264 was 09:27
10 extremely important to Microsoft products? 09:28

11 A. Yeah. I mean I do remember that. But there 09:28
12 are -- all I'm saying is there are alternatives to 09:28
13 H.264. It's simply a question of, you know, whether 09:28
14 those were viable in those circumstances. 09:28

15 Q. You're not an offering opinion one way or the 09:28
16 other on that? 09:28

17 A. I'm not, no. I'm just trying to answer your 09:28
18 question right now. 09:28

19 Q. And what is hold-up? 09:28

20 A. Hold-up is -- the idea there is that if someone 09:28
21 is -- is locked in, that you take advantage of that 09:28
22 lock-in to attempt to extract, in this context again, a 09:28
23 higher royalty than would be -- than you'd be able to 09:28
24 get if they weren't lock-in. 09:28

25 Q. Now, in the testimony that you provided in this 09:28

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1 earlier litigation -- if you look at page 27 -- you said 09:28
2 that it has again to do -- I'm starting at line 10. It 09:28
3 has again to do with the hold-up, which flows from 09:29
4 potential lock-in, that once you've made investments and 09:29
5 setting the standard and companies have designed to the 09:29
6 standard to sell their products, that creates 09:29
7 potentially, not always, but sometimes it creates 09:29
8 switching costs to sort of undoing that. And that 09:29
9 creates a possibility for hold-up to occur. 09:29

10 Do you agree with that? 09:29

11 A. Yeah, I think that's what I just said. 09:29

12 Q. And then you went on to say and, you know, from 09:29
13 my point of view, the whole purpose of FRAND is to try 09:29
14 to avoid that. 09:29

15 Is that a correct statement? 09:29

16 A. Yes. 09:29

17 Q. And the "that" you're referring to is hold-up? 09:29

18 A. Yes, exactly. 09:29

19 Q. Now, would you expect that the owner of 09:29
20 standard-essential patents that has made RAND 09:29
21 commitments should know that it cannot engage in 09:29
22 hold-up? 09:29

23 MR. CANNON: Object to the form of the 09:30
24 question. 09:30

25 THE WITNESS: What do you mean "should know 09:30

21	BY MR. PRITIKIN: [REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
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1	[REDACTED]	[REDACTED]
■	■ [REDACTED]	[REDACTED]
■	■ [REDACTED]	[REDACTED]
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■	[REDACTED]	[REDACTED]
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25

have those handy there, those are the October letters.

10:54

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1 consistent with its RAND commitments? 13:42

2 MR. CANNON: Object to the form of the 13:42

3 question. 13:42

4 THE WITNESS: First of all, there's -- there's 13:42

5 a legal determination there. From my point of view, 13:42

6 again, I don't think it necessarily matters subject to 13:43

7 the patent owner, even if they get an injunction, 13:43

8 continuing to -- to work under the RAND commitment. 13:43

9 BY MR. PRITIKIN: Q. Do you think there are 13:43

10 any circumstances where the owners of standard-essential 13:43

11 patents would be abusing its RAND commitment by trying 13:43

12 to get an injunction against a prospective licensee? 13:43

13 A. Well, I think if it used an injunction to 13:43

14 obtain the hold-up value, then that could be a problem. 13:43

15 But it's really getting the hold-up value that's the 13:43

16 real -- the real difficulty there. They're not 13:43

17 injunction in and of itself. I mean if you have an 13:43

18 injunction, but again you negotiate on RAND terms, you 13:43

19 know, the outcome of that should be a RAND royalty. 13:43

20 Q. Do you think the owner of standard-essential 13:44

21 patents is acting in good faith if it tries to obtain an 13:44

22 injunction while it's engaged in good faith negotiations 13:44

23 with the implementer? 13:44

24 A. Like I said, at some point in the negotiation, 13:44

25 you have two parties that are negotiating in good faith 13:44

5	Again, if -- if the patent owner then uses that	13:44
6	to try to get hold-up value, then I think that's	13:44
7	potentially problematic. But, you know, in principal, I	13:44
8	don't think that you should say oh an standard-essential	13:44
9	patents owner should never get a -- should never be	13:45
10	allowed to have an injunction or exclusion order.	13:45

11	Q. What do you mean by "hold-up value" in the	13:45
12	context you've testifying about in the last few minutes?	13:45

13	A. I think we talked about that before. So it's	13:45
14	hold-up value would be value above -- value of the	13:45
15	technology in the particular application that we're	13:45
16	talking about, as compared to the non-infringing	13:45
17	alternative technologies that could have been used in	13:45
18	the standard at the time the standard was set. You	13:45
19	know, in broad terms, that's what I'm talking about.	13:45

20	Q. Now, normally license negotiations take a	13:45
21	period of time to conclude, in your experience?	13:45

22	A. Yes, some short; some long, yes.	13:45
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23	Q. How long would you have expected reasonably a	13:45
24	negotiation to have taken between Microsoft and Motorola	13:45
25	for the Motorola standard-essential patents?	13:46

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1 the amounts that are being sought are enormous; isn't 15:13
2 that correct, sir? 15:13

3 A. I don't know what you mean by "enormous." 15:13

4 Q. Do you think billions of dollars are enormous? 15:13

5 A. Well, I mean as sitting here myself, you know, 15:13
6 for one thing we don't know what time frame we're 15:13
7 covering. I'm not sure I could tell you what the -- 15:13
8 what the amount is we're talking about without doing 15:13
9 some more work. 15:13

10 Q. Now, based on publicly available information, 15:13
11 Motorola could have figured out approximately what it 15:13
12 was demanding at a 2.25 percent royalty; could it not? 15:13

13 [REDACTED] 15:13

14 [REDACTED] 15:13

15 [REDACTED] So, again, you 15:13

16 know, I think what we're talking about here is a 15:13
17 situation where they put something in this letter 15:14
18 because they were expecting to get more information that 15:14
19 would allow them to reach a conclusion later on. 15:14

20 So I mean especially in that context, given 15:14
21 that he's very clear that that's one of the things he 15:14
22 wanted to understand better. You know, I don't -- if I 15:14
23 were him, I would be sitting there saying, okay, I got 15:14
24 this -- I am going to put this in the letter, but I 15:14
25 don't really know what's going on with Microsoft. 15:14

5	Q. Well, let's indulge me, please. Let's see if	15:14
6	we can figure out what had been readily knowable to	15:14
7	Motorola at the time the letters were sent. There is	15:14
8	publicly available information on global sales and	15:14
9	personal computers, right? You know that?	15:14

11	Q. And you've heard of a company called Gartner?	15:14
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13	Q. They issue forecasts and reports on sales of	15:15
14	personal computer?	15:15

16	Q. And you can get information about that on the	15:15
17	Internet, right?	15:15

18	A. Well, I don't know. You can get very summary	15:15
19	information. Typically you need to pay them a fair	15:15
20	amount of money to get something more detailed.	15:15

21	Q. Motorola could readily have ascertained the	15:15
22	approximate number of PC and laptop sales at the time it	15:15
23	sent the letter in May of 2010, right?	15:15

24	A. I'm sorry, they could have ascertained what?	15:15
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25	Q. Readily have ascertained the amount of	15:15
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1 worldwide laptop and PC sales at the time it sent the 15:15
2 letters in October of 2010? 15:15

3 A. Well, they -- they could get an estimate from a 15:15
4 company like Gartner. I mean that is an estimate. 15:16

5 Q. And you could have gotten that -- they could 15:16
6 have gotten that on the Internet, right? 15:16

7 A. Again, I don't know what Gartner posts on the 15:16
8 Internet. Of course you would want to have -- you know, 15:16
9 you wouldn't want to have, for instance, the Apple units 15:16
10 in there and stuff like that. 15:16

11 (Exhibit 16 was marked for identification.) 15:16

12 BY MR. PRITIKIN: Q. Could you take a look at 15:16
13 Exhibit 16. 15:16

14 A. Sure. 15:16

15 Q. You see the date on that? It's pulled off the 15:16
16 Internet dated May 27, 2010. The dates. 15:16

17 A. Which dates? 15:16

18 Q. The date of the article. 15:16

19 A. Okay. 15:16

20 Q. So that's prior to October of 2010 when the 15:17
21 letters were sent? 15:17

22 A. Right. 15:17

23 Q. And if you look at the second paragraph of the 15:17
24 article, it says that Gartner projects PC shipments will 15:17
25 reach 376 million units in 2010. 15:17

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1 A. Okay. 15:17

2 Q. And you would agree with me that data of this 15:17
3 kind is -- was readily available in 2010? 15:17

4 MR. CANNON: Object to the form of the 15:17
5 question. 15:17

6 THE WITNESS: Just, for instance, I'm not sure 15:17
7 whether these include Apple products or not. 15:17

8 BY MR. PRITIKIN: Q. Well, let's assume it 15:17
9 does. But data of this sort was readily available, 15:17
10 wasn't it? 15:17

11 A. That's my point, is if you wanted to pull Apple 15:17
12 out of it, which would make a lot of sense since they 15:17
13 wouldn't have Microsoft operating systems on it. Then 15:17
14 you would probably have to buy the report from -- from 15:17
15 Gartner. Obviously Motorola could have done that. 15:18

16 But, again, for an opening offer, when you 15:18
17 expect to just get the information from -- from 15:18
18 Microsoft itself. And what's more understand the way 15:18
19 the business operates, then, you know, why go through 15:18
20 this effort when you're about to get what you think -- 15:18
21 or you think you're about to get the actual information 15:18
22 that's truly relevant. 15:18

23 Q. You can volunteer that whatever answer if you 15:18
24 want to, Dr. Leonard. And at some point we may go back 15:18
25 to the court to ask for more time for the deposition. 15:18

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1 A. Please do. 15:18

2 Q. Would you please listen to my question and 15:18
3 answer the question I'm asking. 15:18

4 A. I answer the question -- I'll answer the 15:18
5 question the way that I see fit. I know very well how 15:18
6 this works. And your posturing is not going to have any 15:18
7 impact on me whatsoever. 15:18

8 Q. We'll call Judge Robart at some point, sir. 15:18

9 A. Okay. Go ahead. 15:18

10 Q. You've been through this drill before. 15:18

11 A. Okay. Go ahead. 15:18

12 Q. Well, we will at some point if you don't answer 15:18
13 the question. 15:18

14 MR. CANNON: He's answering the question. 15:18

15 Let's take a short break. Let's take a break. 15:18

16 MR. PRITIKIN: Why don't you talk to this guy. 15:18

17 THE VIDEOGRAPHER: Off the record at 3:19. 15:18

18 (Short break taken.) 15:30

19 THE VIDEOGRAPHER: Back on the record at 3:30. 15:30

20 BY MR. PRITIKIN: Q. Dr. Leonard, just so 15:30

21 we're clear. I'm going to be asking you questions about 15:30

22 information that could have been obtained by Motorola. 15:30

23 I'm not asking you what was actually known. I'm asking 15:30

24 you questions about what was available or what could 15:31

25 have been obtained. 15:31

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1 Q. Is that consistent with what your understanding 15:32
2 is, around 90 percent was Windows? 15:32

3 A. Certainly in a rough -- in a rough sense. I 15:32
4 guess I don't know whether this is worldwide or U.S. 15:32
5 again. But... 15:32

6 Q. I think it shows worldwide, doesn't it, on the 15:32
7 left there? That's what it says. 15:32

8 A. I think that does say worldwide there, yes. 15:33

9 Q. All right. Now, if we go back to Exhibit 16. 15:33
10 And if you look down a little further to the second 15:33
11 paragraph that says, "Gartner projects worldwide PC 15:33
12 shipments will reach 376 million units in 2010. Total 15:33
13 spending is expected to reach 245 billion in 2010." 15:33

14 Do you see that? 15:33

15 A. Yes. 15:33

16 Q. And if we assume that the Microsoft share of 15:33
17 the operating system market is around 90 percent, that 15:33
18 would mean that worldwide sales of PCs with Windows 15:33
19 operating systems would be around \$220 billion? 15:34

20 A. Just in -- provides us here this is the 15:34
21 forecast and the -- the time periods don't match up. 15:34
22 But, you know, it's going to be in that ballpark 15:34
23 probably. 15:34

24 Q. Now, assuming that worldwide sales of PCs with 15:34
25 Windows were on the order of -- let's just take a round 15:34

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1 number -- \$200 billion. Can you make that assumption 15:34

2 for me? 15:34

3 A. Okay. 15:34

4 Q. If we go back to the October 29 letter, if a 15:34

5 2.25 percent royalty were calculated on \$200 billion of 15:34

6 sales, that would be around 4 and a half billion 15:35

7 dollars, right? 15:35

8 A. Let's see. Are you talking about -- sorry -- 15:35

9 H.264 here? 15:35

10 Q. Yes. 15:35

11 A. Okay. I mean if you took 2.25 percent, you 15:35

12 multiplied it by the other number you gave, I think the 15:35

13 math is approximately correct. 15:35

14 Q. Now, if someone at Motorola had gone through 15:35

15 the exercise we just went through, it would have been 15:35

16 fairly easy to determine that a 2.25 percent royalty on 15:35

17 all of the Windows-based PCs is going to be -- produce 15:36

18 an annual royalty of in excess of \$4 billion a year, 15:36

19 correct? 15:36

20 A. I mean if somebody pulled these number off the 15:36

21 Internet and done that math, they could have in 15:36

22 principal. 15:36

23 Q. Now, there also was publicly available 15:36

24 information in October of 2010 concerning what OEMs paid 15:36

25 Microsoft for Windows; was there not? 15:37